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No. 90-1434

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DAVID L. PRIDE, *et al.*,
Petitioners,

v.

VENANGO RIVER CORPORATION, ILLINOIS CENTRAL RAILROAD COMPANY, WHITMAN CORPORATION (formerly known as IC INDUSTRIES, INC.), HARRY BRUCE, HENRY BORGSMILLER, and RICHARD BESSETTE,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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CORPORATE AFFILIATIONS

Illinois Central Railroad Company

The Illinois Central Railroad is a wholly owned subsidiary of Illinois Central Corporation. The subsidiaries and affiliates of Illinois Central Railroad, excluding wholly-owned subsidiaries, are as follows:

Peoria & Pekin Union Railway Co.
Paducah & Illinois Railroad Co.
Mississippi Export Railroad Co.
Terminal Railroad Assoc. of St. Louis
Belt Railway Co. of Chicago
Trailer Train Company

Whitman Corporation

The subsidiaries and affiliates of Whitman Corporation, excluding wholly-owned subsidiaries, are as follows:

Pepsi-Cola General Bottlers, Inc.

Genadco Advertising Agency, Inc.
Kolmar Products Corporation
Pepsi-Cola General Bottlers of South Bend, Inc.
Pepsi-Cola General Bottlers of Brookville, Inc.
Pepsi-Cola General Bottlers of Virginia, Inc.
Pepsi-Cola General Bottlers of Princeton, Inc.
Pepsi-Cola General Bottlers of Toledo, Inc.
Pepsi-Cola General Bottlers of Bryan, Inc.
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Pepsi-Cola General Bottlers of Muncie, Inc.
Pepsi-Cola General Bottlers of Ft. Wayne, Inc.
Pepsi-Cola General Bottlers of Lima, Inc.
Pepsi-Cola General Bottlers of Memphis, Inc.
Pepsi-Cola Bottling Co. of Bloomington, Inc.
Pepsi-Cola Bottling Co. of Oshkosh, Inc.
Marquette Bottling Works
Northern Michigan Vending, Inc.
Beverage Bottlers, Inc.
Four Star Leasing, Inc.
Lougen Limited

Hussmann Tempcool Holdings PTE Limited

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RESPONDENTS' BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

This case involves the simple yet fundamental requirement that all parties who wish to appeal from a district court decision must identify themselves unambiguously in the notice of appeal. *See* Fed. R. App. P. 3(c) (hereinafter "Rule 3(c)"); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). The United States Court of Appeals for the Seventh Circuit dismissed the appeal below because the caption of Petitioners' Notice of Appeal identified the appellants only as "David L. Pride, et al." and the body of the notice named only "the plaintiffs."

Petitioners assert that their notice would not have been dismissed under the standards articulated in *Ford v. Nicks*, 866 F.2d 865 (6th Cir. 1989), and *National Center for Immigrant Rights v. INS*, 892 F.2d 814 (9th Cir. 1989) ("*NCIR*"), *later appeal*, 913 F.2d 1350 (9th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3503 (U.S. Jan. 7, 1991) (No. 90-1090). Accordingly, assert Petitioners, there is a conflict among the Circuits. Not so. The Sixth Circuit reversed its position nearly a year ago in an *en banc* decision. The Ninth Circuit decision Petitioners cite was based entirely on the Sixth Circuit's prior, now-discredited panel decision, and is therefore of questionable precedential value. In short, Petitioners' asserted conflict is rapidly resolving itself.

Alternatively, Petitioners assert that a conflict exists between the holding of the Seventh Circuit in this case and that of the Fifth Circuit in *Brotherhood of Ry. Carmen v. Atchison, T. & S.F. Ry.*, 894 F.2d 1463 (5th Cir.), *cert. denied*, 111 S. Ct. 131 (1990), allowing deficiencies in a notice of appeal to be cured by the filing of a motion for stay pending appeal that accurately identifies all appellants. Upon closer examination, this asserted conflict also vanishes. The collateral document relied upon here is a Certificate of Interest. Such a document would not have been accepted even in the Fifth Circuit to "cure" the deficiency in Petitioners' Notice of Appeal.

This Court has consistently denied post-*Torres* petitions raising these precise issues.[1] This petition presents no reason for a different result.

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[1] *See, e.g., Kunkle v. Fulton County Bd. of Comm'rs, cert. denied*, 59 U.S.L.W. 3562 (U.S. Feb. 19, 1991) (No. 90-884); *Griffith v. Johnston, cert. denied*, 59 U.S.L.W. 3462 (U.S. Jan. 8, 1991) No. 90-546); *Mayeske v. International Ass'n of Fire Fighters, cert. denied*, 111 S. Ct. 347 (1990) (No. 90-402); *Davis v. Tennessee Dep't. of Employment & Sec., cert. denied*, 111 S. Ct. 210 (1990) (No. 90-169); *Fraige v. American National Watermattress Corp.*,

REASONS FOR DENYING THE WRIT

THE PETITION FAILS TO DEMONSTRATE A GENUINE CONFLICT AMONG THE COURTS OF APPEALS

A. The Decision On Which Petitioners Principally Rely Has Been Reversed

Petitioners argue that the Seventh Circuit's ruling that reference in a notice of appeal to "the plaintiffs" is insufficient for purposes of Rule 3(c) is in conflict with two decisions from other Circuits—*Ford v. Nicks*, 866 F.2d 865 (6th Cir. 1989), and the *NCIR* decision from the Ninth Circuit. The purported conflict in fact stems primarily from *Ford v. Nicks*. As the Petition itself indicates, the Ninth Circuit's decision in *NCIR* relied heavily on the *Ford v. Nicks* panel decision. Indeed, *Ford v. Nicks* was virtually the only authority cited in the Ninth Circuit's decision, and the Ninth Circuit plainly stated it was following the reasoning and result of that case. *See* 892 F.2d at 816-17.

Ford v. Nicks, however, is no longer good law. Petitioners fail to acknowledge that in an *en banc* decision issued six months before the decision below, and nine months before their petition was originally filed in this Court, the Sixth Circuit unequivocally rejected *Ford v. Nicks* and specifically held that use of a generic phrase such as "the plaintiffs" or "the defendants" is not sufficient to identify the appellants for purposes of Rule 3(c). *Minority Employees Tenn. Dep't of Employment Sec., Inc. v. Tennessee Dep't of Employment Sec.*, 901 F.2d 1327, 1330 (6th Cir.), *cert. denied*, 111 S. Ct. 210 (1990).

Petitioners' asserted conflict is therefore rapidly vanishing. The Sixth Circuit has harmonized its law on this

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cert. denied, 59 U.S.L.W. 3247 (U.S. Oct. 2, 1990) (No. 90-136); *Barnett v. Petro-Tex Chem. Corp.*, *cert. denied*, 110 S. Ct. 3274 (1990) (No. 89-1761).

issue with the Seventh Circuit, as well as at least five other circuits that have considered this question.[2] As noted above, the Ninth Circuit's decision in *NCIR* relied virtually exclusively on the Sixth Circuit's now-discredited analysis. The reversal of *Ford v. Nicks* completely undermines *NCIR*, and the Ninth Circuit should be given adequate opportunity to reconsider its position.

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[2] *First Circuit*:

Rosario-Torres v. Hernandez-Colon, 889 F.2d 314, 317 (1st Cir. 1989) (en banc);

Fifth Circuit:

Barnett v. Petro-Tex Chem. Corp., 893 F.2d 800, 805 (5th Cir.), *cert. denied*, 110 S. Ct. 3274 (1990);

Tenth Circuit:

Pratt v. Petroleum Prod. Management, Inc. Employee Sav. Plan & Trust, 920 F.2d 651, 654-55 (10th Cir. 1990); *Laidley v. McClain*, 914 F.2d 1386, 1388-89 (10th Cir. 1990);

Eleventh Circuit:

Cotton v. U.S. Pipe & Foundry Co., 856 F.2d 158, 161 (11th Cir. 1988);

D.C. Circuit:

Mayeske v. International Ass'n of Fire Fighters, 905 F.2d 1548, 1549 n.1 (D.C. Cir.), *cert. denied*, 111 S. Ct. 347 (1990).

The Second Circuit's position is not yet entirely clear. In *Baylis v. Marriott Corp.*, 906 F.2d 874 (2d Cir. 1990), the court accepted a notice stating that "all of the plaintiffs" appealed, on the ground that including the word "all" left no ambiguity as to which plaintiffs intended to appeal. This decision is of no use to Petitioners here, who named only "the plaintiffs," providing no guidance as to *which* plaintiffs were appealing. In two *per curiam* decisions, motions panels in the Second Circuit appear to have reached conflicting results when faced with language closer to the case at hand. *Compare Shatah v. Shearson/American Express, Inc.*, 873 F.2d 550 (2d Cir. 1989) ("the parties" insufficient), *with Association of Am. Medical Colleges v. Cuomo*, 913 F.2d 55 (2d Cir. 1990), *rev'd and vacated on merits*, 1991 WESTLAW 32263 (2d Cir. Mar. 12, 1991) ("the defendants," referring to eighteen state officials sued in their official and individual capacities, sufficient). This ambiguity should be addressed and resolved by the Second Circuit itself in future cases.

Indeed, it was apparently not until December 19, 1990, that the Ninth Circuit acknowledged the Sixth Circuit's decision in *Minority Employees*, *see United States ex rel. Blue Circle West, Inc. v. Tucson Mechanical Contracting, Inc.*, 921 F.2d 911, 914 (9th Cir. 1990), and there is still no indication that the Ninth Circuit has been given an opportunity to acknowledge that this decision destroys the underpinnings of *NCIR*. The Ninth Circuit has not been expansive in its treatment of notices of appeals in any other respects. The Circuit follows the general post-*Torres* rule that parties "not identified by name in the notice of appeal are not parties to [the] appeal," *Nevada Highway Patrol Ass'n v. Nevada*, 899 F.2d 1549, 1551 n.1 (9th Cir. 1990).[3] There is sufficient room within the Ninth Circuit's own opinions, therefore, to allow the Circuit to harmonize its rules with those of the remainder of the Circuits.

B. Petitioners' Attempt to "Cure" Their Inadequate Notice of Appeal Would Be Insufficient In Any Circuit

The Fifth Circuit has "closely followed" *Torres* and recognizes that "failing to name a party on a notice of appeal results in a failure of that party to appeal," *Morales v. Pan Am. Life Ins. Co.*, 914 F.2d 83, 85 (5th Cir. 1990), but has stated that in certain "limited situations" the court may interpret "et al." on a notice of appeal to include additional parties than those named. The "limited situation" Petitioners seek to invoke here is when appellants all are individually listed in a motion or supporting memorandum for stay pending appeal, filed within thirty days of entry of judgment in the district court. *See id.* at 85 (dicta) (*citing Brotherhood of Ry. Carmen v. Atchison, T. & S.F. Ry.*, 894 F.2d 1463, 1465

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[3] *See also United States v. Tucson Mechanical Contracting, Inc.*, 921 F.2d at 914 ("et al." insufficient); *Sauceda v. Washington State Department of Labor & Indus.*, 917 F.2d 1216 (9th Cir. 1990) (reference to "plaintiffs" in body of notice insufficient, where caption specifically named other plaintiffs without use of "et al.").

(5th Cir.), *cert. denied*, 111 S. Ct. 131 (1990)). The *Carmen* panel held that such a document can serve as the "functional equivalent" of the missing notice. For purposes of this Petition, however, it is *not* correct to assume, as Petitioners do, that their Notice of Appeal would have survived even in the Fifth Circuit under the *Carmen* rationale.

In the only two cases in which the Fifth Circuit allowed another document to "cure" a failure to identify the appellants, that document was either a motion or a memorandum supporting a motion for a stay pending appeal in which all appellants were specifically named. *See Warfield v. Fidelity & Deposit Co.*, 904 F.2d 322, 325 (5th Cir. 1990); *Brotherhood of Ry. Carmen v. Atchison, T. & S.F. Ry.*, 894 F.2d at 1465. A motion for stay, like the notice of appeal, is an operative, substantive document seeking relief from the court of appeals in its appellate capacity.

In contrast, the Fifth Circuit has specifically held that a counsel's appearance form is *not* the "equivalent" of a notice of appeal and cannot "rescue" a defective notice. *Barnett v. Petro-Tex Chem. Corp.*, 893 F.2d 800, 804 (5th Cir.), *cert. denied*, 110 S. Ct. 3274 (1990); *Page v. DeLaune*, 837 F.2d 233, 237 (5th Cir. 1988). *See also Goos v. ICC*, 911 F.2d 1283, 1289 (8th Cir. 1990). The document Petitioners offer, a certificate of interest, was filed together with counsel's appearance form but is even more tenuously related to a notice of appeal than an appearance form. By its terms, the purpose of the certificate of interest is "[t]o enable the judges to determine whether recusal is necessary or appropriate." *See* Petition at C-19. This document is not directed at other parties and is neither designed nor intended to provide them with the notice required by Rule 3(c). Nor could it unambiguously serve that purpose. A cautious appellant might well provide the names of all parties ever involved in the litigation, appellants or not, to enable the court to

avoid even "the appearance of impropriety." Canon 2, Code of Judicial Conduct.

In short, Petitioners cannot show that the outcome of their attempted "cure" would have been any different in the Fifth Circuit from the outcome in the Seventh.[4] This case is not an appropriate vehicle to consider whether collateral documents may "cure" a defective notice of appeal.

CONCLUSION

The prevailing approach to Rule 3(c), as exemplified by the decision below, is a simple and sensible one consistent with the task at hand. It is not too much to ask that all of the items specified by Rule 3(c) be contained unambiguously in the notice of appeal. Petitioners here, for example, had ample instruction not only from this Court but also from the Seventh Circuit on the requirements for notices of appeal. *See Pride v. Venango River Corp.*, 916 F.2d 1250, 1253 (7th Cir. 1990). The alternative, more diffuse approach advocated by petitioners, involving not only imprecise language in the notice but also indeterminate types and combinations of separate documents, can lead only to more divergences from the rule and more uncertainty and controversy concerning appeals.

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[4] Few courts to date have addressed this issue. As the *Goos* case cited in the text indicates, the Eighth Circuit (like the Seventh) does not accept the "cure" theory regardless of the document offered. The Third Circuit's position is far from clear. *Compare Cruz v. Melendez*, 902 F.2d 232, 236 (3d Cir. 1990) *with Masquerade Novelty, Inc. v. Unique Indus., Inc.*, 912 F.2d 663, 665-66 (3d Cir. 1990). That Circuit should be given additional opportunities to consider the matter. The Tenth Circuit has held that a docketing statement filed before the time to appeal had expired may cure a defective notice. *Hubbert v. City of Moore, Oklahoma*, 923 F.2d 769, 772 (10th Cir. 1991). Petitioners' certificate of interest bears no more resemblance to a docketing statement than to a motion for stay pending appeal, however, and once again the Petitioners cannot demonstrate that their fate would have been different in a different Circuit.

Accordingly, and for the reasons set forth above, Respondents respectfully request that the Court deny the Petition.

Respectfully submitted,

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